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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 268

ELWOOD LOWELL DIERCKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 16-22) is reported at 223 F. 2d 12.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1955 (Pet. 23), and a petition for rehearing was denied on July 18, 1955 (Pet. 24). The petition for a writ of certiorari was filed on July 26, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, in requesting reopening of his classification, presented "written" information not considered when registrant was classified, "which, if true, would justify a change in the registrant's classification" from conscientious objector to minister.

2. Whether petitioner adduced any factual basis for his charges of discrimination by the local board.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Universal Military Training and Service Act, and regulations issued thereunder, are set forth in the Appendix, *infra*, pp. 22-24.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Seventh Circuit (Pet. 23), affirming the judgment of the District Court for the Eastern District of Illinois finding petitioner guilty of violating the Universal Military Training and Service Act by refusing to perform civilian duties required of him as a conscientious objector (R. 132-133).

Petitioner's record with the selective service system may be summarized as follows:

Petitioner was born on April 4, 1927 (R. 42). In his selective service questionnaire, filed on October 12, 1948, he stated that he "regularly" served as a minister of the Jehovah's Witnesses sect and that he was ordained on April 29, 1945 (R. 44). He further stated that he worked on his father's farm,

40 hours per week, and was paid $35.00 per week; and that he was "actually and personally responsible for the operation of the farm" (R. 45-46), the farm products aggregating $10,000 in value for the preceding crop year (R. 46). Petitioner considered his farm work as "part time" and stated "Main occupation is minister" (R. 45-46).

Petitioner also claimed physical disability by reason of "metabolic disturbance", and requested classification as either IV-D (ministerial exemption) or IV-F (physically unfit) (R. 126).

Petitioner furnished affidavits of four Jehovah's Witnesses, including his father, characterizing petitioner as "an ordained minister of the gospel" (R. 50-53). One of the affiants described petitioner as "assistant minister of the Dundee Company" since April 1948, speaking "from the pulpit to the congregation at least once each week," and also "preach[ing] public Bible lectures from the pulpit", "aid[ing] in the supervision of the worship and service of Jehovah's witnesses which includes calling from house to house * * * and aiding in the conducting of home Bible studies," and "aid[ing] in conducting the activities of the congregation that they might be in harmony with the instructions of the Watchtower Bible & Tract Society" (R. 50). Two affiants stated that petitioner delivered sermons and preached at houses (R. 51-52). Petitioner's father, himself the Company Servant of the Dundee congregation, stated that petitioner was "Assistant Company Servant," that he did house-to-house preaching, delivered sermons,

and gave "one hour public Bible lectures," devoting 20 hours per month to the house-to-house work, 4 hours per month to "preaching from the pulpit at the various meetings" in the Kingdom Hall, and 25 hours per month "to study by himself" (R. 53).

In his Special Form for Conscientious Objector, filed on April 20, 1949, petitioner added to the earlier statements the following: his formal education terminated with four years of high school, 1941-1945 (R. 58); he commenced Theocratic Ministry School in 1944 (R. 58); in addition to farm work since 1944, he was an insurance salesman commencing in 1948, also for his father (R. 58).

On April 26, 1949, petitioner was classified as a conscientious objector, IV-E, and on December 18, 1950, was reclassified as I-A-O, a conscientious objector available for noncombatant service in the armed forces (R. 48). He protested the reclassification, adding to the record a certificate of the Watch Tower Bible & Tract Society that he "is an ordained minister." The certificate stated, *inter alia,* that "Jehovah's witnesses are ordained and commissioned by God, and * * * preach * * * by calling upon people at their homes * * * " (R. 62).

Upon personal appearance before the local board on January 11, 1951, petitioner was reclassified as a conscientious objector IV-E (R. 48). The board record showed the following with reference to the ministerial exemption (R. 63-64):

> B. M. What classification do you want 4-E or 4-D?

E. D. Either classification.

B. M. How are you ordained?

E. D. Our ordination is by water as Jesus was.

B. M. Do you do other work?

E. D. I have another job on the farm for my father.

E. D. I preach a little every Sunday and then I preach and teach during the week and on week nights.

B. M. Do you perform marriages legally?

E. D. No, but I can receive it.

* * * * *

B. M. Do you have any formal schooling for this work?

E. D. I am enrolled in a ministerial school.

On December 18, 1951, petitioner was reclassified under the new designation for a conscientious objector, I-O (R. 48).[1] Petitioner protested, claiming that he was entitled to the classification of an ordained minister "regularly perform[ing] the duties of such" (R. 65). Petitioner added the information that he engaged "in some form of ministerial work every day of the week," that his name was on record with the county clerk "as a minister

[1] The Act was amended on June 19, 1951, to terminate the total exemption of conscientious objectors and to require them to perform civilian work contributing to the maintenance of the national health, safety, or interest (65 Stat. 75, 86). The regulations were amended on September 25, 1951, in accord (E.O. 10292, 16 F.R. 9843, 9849).

performing marriages" and that he had obtained a passport listing his occupation as clergyman (R. 65). The record of his personal appearance before the local board on January 24, 1952, included the following new matter and rephrasings, *inter alia* (R. 66-67):

> * * * The past six Sundays I gave sermons of an hour and a half in length on different subjects in the Bible. * * * I have been in business with my father in Algonquin, insurance business, that is where I make my money. I have dedicated my life to preaching. The money I receive from the business is secondary. I have to keep a car going and keep myself presentable.
>
> * * * * *
>
> B. M. In the draft law it says a full time vocation. We have had cases before the courts that have upheld that part, which according to you is a vocation and the courts call it an avocation. So far according to our regulations we can not call that anything but an avocation.
>
> L. D. I have a report here that 20% of all the Baptist ministers receive no pay, the Mormons receive no pay.
>
> B. M. They don't claim exemption if you look up your records. We are giving you a chance with the I-O, you will work for the Government.

L. D. None of our ministers receive pay of any kind.

* * * * *

L. D. Well, the situation with myself, I have been a regular minister to the people of our congregation, I have performed marriages. 3rd paragraph from the SS Regulations, I do that regularly.

B. M. You think that your preaching is your vocation and that your insurance business is your avocation.

L. D. I want to show you my Minister's passport which says that I am a minister.

B. M. Yes, we know all about that. If I told the State Department I was a carpenter, they would put that down.

L. D. In the draft law, officials in Government are exempt. Would you deny the official the classification if you wanted to. I work every evening and on Sunday. The job is to keep body and soul together.

B. M. We can't argue on this, but by the past records what you are doing is considered an avocation not a vocation. You have your rights of appeal and all the records go with it, they know more of the answers from the legal angle. That is all you have to do. That is the position this Board will take.

L. D. I have said before we receive no pay so I have to make a living some other way.

Petitioner stated, at the trial, that the board's record of the personal appearance was inaccurate in that he had not, "to my knowledge", stated that he had "been in business" with his father, but only that he earned his living from that source (R. 19). He also contended that the board refused to hear him out on the biblical explanation of his right to earn his living independently of his ministerial work (R. 20).[2] Petitioner also charged that the board "contended" that receipt of pay for work made that one's vocation (R. 23).[3]

The appeal board, on September 11, 1952, classified petitioner I-O (R. 77). On October 3, 1952, the board mailed to petitioner, for return on October 8, the form of special report in which con-

[2] The trial judge permitted petitioner to make the biblical explanation in its entirety; the explanation added no data as to petitioner's activities or status in his congregation (R. 20-22).

[3] The same complaints appeared in petitioner's letter of appeal, dated February 2, 1952 (R. 69). The letter of appeal included extensive argument of the law and citation of decisions, but added no data as to the time devoted to ministerial activities or any special responsibilities of petitioner to the congregation (R. 69-74). The board record shows receipt, on the following day, of a certificate of the Watchtower society, dated February 1, 1952, that petitioner had been "ordained" on April 29, 1945, that he "presently" officiated "as assistant presiding minister" of the Dundee "Congregation," that he engaged in preaching as a "missionary evangelist," that he had served since July 4, 1950 as "Territory Servant" of the "congregation," "charged with supervising the systematic preaching * * * in the area assigned to the church and assisting the presiding minister in planning and carrying out the various services of the congregation," and that petitioner was "given additional responsibility as Advertising Servant on Nov. 15, 1950, and Bible Study Servant on Jan. 12, 1952" (R. 74-75).

scientious objectors are asked to designate their work qualifications with respect to the approved civilian work listed at the local board offices (R. 84-87). Petitioner failed to return the form until October 14, at which time he ignored the specified type of work and inserted statements asserting willingness to work at ministry work, factory work, or farm work for the Watchtower society (R. 86-87). He also added a statement that in 1942, under a selective service opinion, "Pioneers * * * were to be classification of 4-D the same as Roman Catholic Lay Brothers, Salvation Army workers, Volunteers of America and many others" (R. 87).

Meanwhile, on October 7, 1952, petitioner filed a request for reclassification to IV-D because of appointment in June 1952 (sic) as "assistant to the presiding minister of the Dundee Congregation," and because of appointment on October 1, 1952, as a pioneer "required to preach a minimum of 100 hours per month" (R. 79-80). Petitioner wrote that "Pioneers have been recognized as full time ministers and have been given 4-D classifications by other local draft boards" (R. 79-80) and that "[t]here should be no question that now as a Pioneer, full time, Minister I should be regarded as a regular and duly ordained minister" (R. 80). He also characterized his activities in the general language of the statute as involving "regularly," and "not irregularly or incidentally," preaching, as his "customary vocation" (R. 80).

Neither the request for reclassification nor the pioneer certificate inclosed with it set forth a spe-

cific hourly increase in the time actually devoted by petitioner to his religious activities,[4] nor was any new element of leadership or any diminution in the insurance and farm activities specified.

On October 22, 1952, the local board wrote to the State Director asking whether it was mandatory "on the new evidence" of the letter of October 7, 1952 and the pioneer certificate, that petitioner be reclassified as a minister (R. 88). The State Director replied that it was not mandatory "on the information provided" unless the local board was of opinion that petitioner was qualified. The State Director further noted that the file indicated that petitioner continued to sell insurance as a means of livelihood and that "[i]n our opinion 100 hours per month [the religious activity] does not constitute a full time vocation" (R. 89). The local board notified petitioner, by letter dated November 19, 1952, as follows (R. 90):

> Your letter of October 7, 1952 requesting a reclassification to 4-D was reviewed by the Board at their meeting on October 21, 1952. It was decided at that meeting to write to State Headquarters for an opinion.
>
> The opinion was received and reviewed prior to a personal interview with you at the meeting of the Board November 18, 1952. The Board orally told you that they would not re-

[4] The pioneer minimum requirement, assuming petitioner actually met this requirement, set an average of about 100 hours per month.

> open your classification of I-O. In their opinion you do not qualify for the classification of 4-D.

The meeting with petitioner, referred to in the above letter, was held to discuss petitioner's failure properly to complete the form (*supra*, pp. 8-9) in which he was to designate one of the approved agencies with which he would render civilian service as a conscientious objector.[5] Petitioner testified at the trial, however, that he orally informed the board, at this meeting, that he was working only an average of 15 hours per week in his secular work (R. 24). Petitioner also testified that "they" said they were refusing reopening of his classification because of instructions by the Chicago office not to give any of the Jehovah's Witnesses a 4-D classification under any circumstances (R. 24).

On November 19, 1952, and again on November 26, 1952, petitioner complained to the State Director concerning his classification, and was informed that the decision as to classification was vested in the selective service boards (R. 91-93). The Director also noted (R. 92): "Your file indicates

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[5] The purpose of the meeting was so specified in the appropriate notation on petitioner's questionnaire (R. 49), and in a further letter of the board, dated November 19, 1952, designating three positions available to conscientious objectors at an Illinois State hospital (R. 90-91). Petitioner is thus in error in stating that the request to reopen was "still pending" at the time of the November 18 meeting (Pet. 4) and in referring to the meeting as a "reopening hearing" (Pet. 12).

that the majority of your time is spent selling life insurances and consequently the local board did not feel that you qualified under the aforesaid regulations. It is our opinion that they were within their prerogative to make such determination."

On December 4, 1952, petitioner wrote to the local board requesting a personal hearing and stating that he had "additional" information "bearing on [his] case to present" (R. 94). The board rejected the request, pointing out that petitioner had had his personal appearance and appeal under the regulations (R. 94). On December 8, 1952, in refusing to answer the board's repeated request for information in connection with assigning work to him, petitioner reiterated his claim to a IV-D classification, and purported to restate what occurred at the November 18, 1952 meeting with respect to work assignment, asserting that the remark had then been made that the Chicago office had ordered that pioneers were not to be recognized as ministers. Petitioner also asserted that the majority of his time was not devoted to selling life insurance, but that he devoted 40 to 60 hours per week to his religious activities (R. 95-98). Petitioner also filed copies of two publications by the general counsel of his society, *Defending and Legally Establishing the Good News,* and *Memorandum in Reference to the Classification of Jehovah's Witnesses under the Act and Regulations* (R. 98). He did not supply the information requested by the board concerning duties he would perform as a conscientious objector.

The board thereupon referred the file to the State Director (R. 99) and notified petitioner that his classification would not be reopened (R. 100). The State Director scheduled the further steps in attempting to agree on work which petitioner would be willing to perform (R. 102-104, 106-108, 111-117). At a further meeting for that purpose, petitioner again interpolated statements with respect to his classification asserting that a board member had mentioned that the ministerial classification was denied because of petitioner's secular work (R. 107). Upon assignment to work at the State hospital, petitioner failed to report for service (R. 117).

The District Judge, in an opinion extensively reviewing the record (R. 125-131), pointed out that petitioner at no time had properly indicated any reduction in his extensive, 40-hour-per week secular work as farmer and insurance broker, as distinguished from *Dickinson* v. *United States,* 346 U.S. 389, in which a marked change from full-time secular work had been clearly detailed (R. 130). Petitioner was sentenced to two years' imprisonment (R. 132-133).

The Court of Appeals affirmed, pointing out, *inter alia,* that the characterization of petitioner as a "pioneer" minister in a certificate would not be conclusive of whether "in fact" petitioner was a full-time minister (Pet. 20), and concluding that the board did not act arbitrarily or deny petitioner any procedural rights (Pet. 20).

ARGUMENT

1. Petitioner contends (Pet. 2, 6-7, 9) that the local selective service board refused to consider his request for reopening of his classification because it assumed that it could reject such a request at will. No such assumption by the board is remotely indicated. The board, to the contrary, wrote to the State Director after it had "considered the new evidence in this file" including, specifically, petitioner's letter dated October 7, 1952, and selective service Form No. 152, with which latter form petitioner's processing for service as a conscientious objector had already begun. The board asked advice of the State Director only as to whether it was mandatory "to give a 4-D [minister] classification on the new evidence" (R. 88) —not whether it was "mandatory for them to reconsider the case" (as misapprehended by petitioner, Pet. 2).

The State Director replied that it was not mandatory "to classify this subject IV-D" on the information provided, "unless, in the opinion of the local board the registrant is qualified" (R. 89). He did not say that the Board was not required to consider the case. For petitioner to emphasize the word "mandatory" in such displacement from context as appears in the petition is to fall into just such erroneous play upon words as that criticized by this Court in *Witmer* v. *United States*, 348 U.S. 375, 384.[6]

[6] The purported conflict with a decision of the Court of Appeals for the Fifth Circuit in *Olvera* v. *United States*, No.

Petitioner's entire claim that he has been deprived of a right to reopening of his classification is based upon his failure to observe the obvious requirement that a classification, representing the end product of an extensive administrative process, is to be reopened, under the regulations, only upon the basis of (1) "written" information presenting (2) "facts" (3) "not considered when the registrant was classified", which, if true (4) "would justify a change in the registrant's classification" (*infra*, p. 23). It is clear that the selective service board had before it, from the outset, all the arguments and contentions with which petitioner, in his request for reopening, sought to change the board's finding. The mere cumulative repetition of the earlier labeling of his activities as "full-time" and as those of a "minister" added nothing new to the record and obviously was not conclusive upon the board in the absence of specific, genuine facts—not mere arguments—remedying the two basic deficiencies in his case, *i.e.* (1) the imbalance between his full-time farm and insurance activities as opposed to the substantially lesser amount of time devoted to his religious activities, and (2) the absence of the necessary leader-

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15,260, decided on June 17, 1955, disappears in the face of that court's own distinguishing of the facts, pointing out that what was there held to be arbitrary was "the action of the board in this case, in refusing, not for the reason stated in Witmer's case that the showing made did not entitle Witmer to a reopening, but for the stated reason, because reopening was not mandatory—in short 'we won't reopen because we don't have to'" [Slip Op. 6].

ship aspects from his religious activities, which were largely indistinguishable from those of ordinary lay members of his sect.

Petitioner's shifts in his allocations of time were as insufficient as they were belated. On October 7, 1952, when petitioner asked for reopening of his classification, he indicated no change from his written record with the board that he was devoting 40 hours per week to the farm, that he was "actually and personally responsible for the operation" of this farm, producing $10,000 of products per year, and that he was also in the insurance business (*supra*, pp. 2-4). Moreover, he stated no new, specific amount of time devoted to religious activity, and even the implication that he was meeting the minimum monthly requirement of a pioneer meant only about 23 hours per week, as against the 40 hours devoted to the farm alone. The fact that the Watchtower society called this 23 hours "full time" ministry could not make it such, as against the record, or make it controlling upon the selective service system.[7]

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[7] Petitioner also seeks to rely upon a purported oral remark to the board, the day following the adverse ruling upon his request for a reopening, to the effect that he had decreased his secular activity, but this assertion was never properly or seasonably stated by him in writing, as specifically required by Section 1625.2 of the regulations (*infra*, p. 23), but was alleged for the first time in petitioner's oral testimony at the trial, a year and a half subsequent to the time when the allegedly remembered statement was asserted to have been made. It is no imposition of hyper-technical requirements to insist upon compliance with the simple requirement of the

Petitioner's record disclosed a further gap which was never remedied in anything supplied when he requested reopening—he was never a leader of his congregation or substantially distinguishable from its laiety, as is necessary in order to come within the narrow exemption established by Congress. The congressional requirement, consistently enunciated since the first decisions concerning the selective service legislation, was most recently reiterated in *Dickinson* v. *United States,* 346 U.S. 389, 394:

> The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, "is a narrow one, intended for the leaders of the various religious faiths and not for the members generally." S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all mem-

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regulation that assertions be put in writing, particularly where, as here, a registrant has disclosed the utmost familiarity with the text and line of his every right, has written copiously upon every pertinent favorable detail, but has not put into writing, at a time when it can still be investigated, a significant statement of fact that plainly should not be left to subsequent oral declaration at a trial. Petitioner is not entitled to rely upon his own belated oral testimony that he injected a remark concerning his classification at a meeting convened for the sole purpose of determining the work to be done by petitioner as a conscientious objector.

Petitioner's further letter of December 8, 1952, two months after the beginning of his processing for work as a conscientious objector, adducing for the first time a purported "forty to sixty hours" per week time in his religious activities, came too late and was still insufficient to outweigh the hours devoted to the farm and to the insurance business.

bers of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. *Cox* v. *United States,* 332 U.S. 442 (1947).

Dickinson, as distinguished from the instant petitioner, was the Company Servant or presiding minister of his Company, and he arranged for and presided over three to four meetings of the Company each week (346 U.S. at 393). The instant petitioner, on the other hand, was never the head of his congregation, and that fact was accentuated rather than controverted by the array of subordinate titles he adduced. His father was the Company Servant at the outset of petitioner's series of communications (R. 59) and at no time in petitioner's subsequent bids for exemption did petitioner show a change in that fundamental fact or show any basis upon which a congregation of some thirty-six to forty persons (R. 31) required a second minister.

The required showing of leadership, and a consequent basis for reopening the classification, was not to be made out by showings of gradual increases in time devoted to religious activities, for those activities, in petitioner's case, were preponderantly the common lay work of all the baptized and/or "pioneer" members of petitioner's sect (all of whom consider themselves "ministers"), *i.e.* house-to-house proselytizing, studying for such "ministry", and lecturing on the bible. Nor was the

gap in petitioner's qualifications closed by his purported oral remark to the board members—long after his request for a reopening and when he was already being processed for work as a conscientious objector—that he was now working only fifteen hours per week at secular work. What was important "to justify a change in the registrant's classification" was a change, as well, in the nature of petitioner's status in his congregation, and not how much time he was devoting either to his lay religious activities or to his secular activities.[8]

2. Petitioner charges that the local board felt itself bound by the directives of a State Director who was indulging in a "statewide policy of discrimination against Jehovah's Witnesses" (Pet. 2, 7). Not a particle of evidence of any such policy or prejudice on the part of the State Director is adduced. Moreover, it is indisputable upon the basis of the correspondence itself that the State Director instructed the local board clearly and unequivocally that the decision on reclassification was one to be made by the local board itself (*supra*, pp. 10-12).

Petitioner's attempt to rely on his own recollection of purported oral statements by the board members that they could not consider his part-time

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[8] The specific line of judicial and legislative authority from *Cox* v. *United States*, 332 U.S. 442, through *Dickinson* v. *United States*, 346 U.S. 389, 394, cited *supra*, pp. 17-18, disposes of petitioner's contention that "[t]he full-time pioneer minister is recognized as a minister of religion under the act" (Pet. 10).

activities a basis for exemption as a minister under current selective service directives are unsupported by any fact or even implication that the directives were those of a state director bent on banning Jehovah's Witnesses, as distinguished from the long-standing general regulations limiting the ministerial exemption in any case to a person whose vocation is genuinely that of a minister.[9] At no point in the record do we find the slightest basis for petitioner's argumentative statement, made as if a statement of fact, that "[t]he court below has done to Jehovah's Witnesses what the Supreme Court has said should not be done to the group; it has left the congregation without a cleric" (Pet. 14). To the contrary, petitioner himself acknowledged at the outset that his father was the cleric of the congregation—"the pastor or leader," the "company servant" (R. 59), and at no subsequent point did petitioner ever indicate to the board that his father was no longer available to the congregation as its minister.

CONCLUSION

The decision below is correct and there is no conflict of decision. It is respectfully submitted that

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[9] The lack of any conflict with *Niznik* v. *United States*, 184 F 2d 972 (C.A. 6), cited by petitioner (Pet. 8-9), is manifest in any comparison of the instant record with the quoted language of the local board in *Nizik*, which specifically denied the exemption to Jehovah's Witnesses as such (Pet. 8).

the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

AUGUST 1955.

APPENDIX

Statutes and Regulations Involved

Universal Military Training and Service Act, 62 Stat. 604:

Section 6(g) [50 U.S.C. App. 456(g)]:

> Regular or duly ordained ministers of religion, as defined in this title * * * shall be exempt from training and service (but not from registration) under this title.

Section 16(g) [50 U.S.C. App. 466(g)]:

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> (2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization

of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

Selective Service Regulations, Title 32, C.F.R.:

1625.2 *When Registrant's Classification May Be Reopened and Considered Anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification * * * .

* * * * *

1625.4 *Refusal to Reopen and Consider Anew Registrant's Classification.*—When a registrant * * * files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 268

ELWOOD LOWELL DIERCKS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

Now comes the petitioner and responds to the Brief for the United States in Opposition. The points in the Government's brief will be answered in the order in which they are made by the Government in its brief.

I.

Question 1 in the Government's brief on page 2 is improperly stated. The merits of petitioner's request to reopen are not presented to this Court. That question presented by the Government under question 1 (at the top of page 2 of its brief) was specifically omitted by petitioner. It was thus eliminated from the case.

The question presented to the Court is a procedural-due-process question. Petitioner seeks review (under question 1 of the petition on page 2 thereof) because the local board denied procedural due process in arbitrarily and unreasonably concluding that the case should not be reopened because "it was not mandatory" for them to reconsider the case.

II.

The Government on page 3 emphasizes a statement made by the petitioner in the beginning of his case before the draft board that his main occupation was that of a minister, even though he was devoting forty hours a week to work on the farm. This was a mere argument or conclusion on the part of petitioner. It was not contended by petitioner that the draft board illegally denied the minister's classification when he was engaged in the ministry part time.

III.

At the bottom of page 9 and the top of page 10 and in footnote 4 on page 10 the Government emphasizes that the request for reclassification and the pioneer certificate did not show an actual change in time devoted to ministerial work. While this is true the other evidence that was before the local board prior to the final denial of the request to reopen did show such "hourly increase in the time actually devoted by petitioner." It is the whole record and not mere isolated parts that is determinative.

IV.

On page 11 the Government emphasizes that the meeting before the local board at which he stated he was devoting only 15 hours a week to secular work was only concerning his "failure properly to complete the form." The meeting was not thus limited. The board at such meeting also undertook to consider the reopening request. The local board permitted Diercks to give oral testimony. There is nothing in the regulations or in the act that prohibits a board from considering oral testimony on a written request to reopen. Diercks was permitted to testify orally and answer questions propounded by the board on his request to reopen. Such testimony became a part of the record as much as did the written documentary evidence.

V.

The Government (on page 14 and in footnote 6 on that page) takes the position that the petitioner has indulged in a mere play upon words. The action of the local board is not to be determined by mere isolated statements appearing in the file. The action of the local board is to be determined by what was stated by the State Director. The board informed the State Director that it would like to know "if it is Mandatory for them to give a 4-D classification on the new evidence." [R. 88] The State Director replied: "It is not mandatory to classify this subject IV-D based on the information provided, unless, in the opinion of the local board the registrant is qualified." [R. 89] This is not all of the record in this case. There apparently was an earlier communication from the State Director to the local board pertaining to the subject of Jehovah's Witnesses in general that did not appear in the file. This illegal policy, not shown in the papers in the draft board file, is established by the undisputed evidence appearing in the record. At the last hearing conducted by the local board on the request to reopen the board members clarified what appears in the file: "They said that they were not going to

re-open my classification for the simple reason that they were given instructions by the Chicago office not to give any one of the Jehovah's Witnesses a 4-D classification under any circumstances and they said no matter what you do or what you say we will not give you a 4-D classification." [R. 24-25]

This testimony was undisputed. The Government made no effort whatever to cross-examine petitioner on this evidence. The Government did not call any board member to contradict it. The clerk of the board was not even recalled. No memorandum was made of the testimony taken at this last hearing upon the request to reopen. The Government is wholly estopped from denying or from questioning this evidence. It becomes as much a part of the record in this case as the written documents that are a part of the draft board file. Oral evidence is material for the purpose of establishing the denial of procedural due process of law. —*United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90, 93; *Kulick* v. *Kennedy*, 2d Cir., 1946, 157 F. 2d 811, reversed on other grounds, 332 U. S. 174 (1947); *United States* v. *Di Re*, 332 U. S. 581, 593 (1948).

VI.

The Government (at the top of page 15) takes the position that the question of procedural due process involved here is to be determined upon whether the facts presented were sufficient to justify a reopening. This is a misrepresentation of the problem. Regardless of whether a sufficient case to reopen the classification was shown there still remains the denial of procedural due process because of the illegal attitude of the board in considering the request to reopen on the basis of whether it was mandatory to reopen. This destroyed the jurisdiction of the board. Whether petitioner made out a prima facie showing or not is entirely irrelevant.

VII.

In the Government's brief (at the top of page 15 and on pages 16 and 17 in footnote 7) the Government takes the position that petitioner's oral testimony as to what the board members said to him and what he said to them may be disregarded because it is not stated "in writing" as required by Section 1625.2. While the request to reopen must be in writing, there is no strict construction of the regulations from a procedural standpoint against the registrant. A broad and liberal interpretation of the procedural regulations must be placed upon them to avoid injustice and technical denial of substantial rights.—*Tung* v. *United States,* 1st Cir., 1944, 142 F. 2d 919, 921-922; *Berman* v. *Craig,* 3rd Cir., 1953, 207 F. 2d 888, 890-891.

In *United States* v. *Greene,* 7th Cir., 1955, 220 F. 2d 792, the court said: "While classification is the democratic method for obtaining military man-power it is not an adversary proceeding between Board and registrant in which the slightest mis-step mechanically penalizes registrants."

VIII.

The Government on page 15 states that there was no change from full-time farm and insurance work to full-time religious activity. This statement is answered by the statement of the evidence in the petition for writ of certiorari, pages 5-6.

IX.

The Government states that there was an absence of necessary leadership by petitioner (pages 15-16) and that his religious work was similar to that performed by "ordinary lay members" of his organization, Jehovah's Witnesses. Petitioner was a leader of the congregation of Jehovah's Witnesses. In addition to being a pioneer minister he was the assistant congregation servant. He preached and delivered sermons from the pulpit. (See the Government's brief at pages 3-4.) In addition to this he was a full-

time pioneer and, as such, took the lead in the missionary field as a minister. As a minister he was engaged in preaching and teaching the doctrines and principles of Jehovah's Witnesses. His congregation of laymen was to be found in the homes in his missionary field where he preached, made regular missionary revisits and conducted regular weekly home Bible studies as a minister.

In addition to this congregation of 'laymen' (not assembled under one roof) he acted as assistant presiding minister of the congregation of Jehovah's Witnesses, which is a *congregation of ministers* (part time or full time), *not laymen.* Jehovah's Witnesses are all ministers. All in the congregation are engaged in preaching the good news of God's Kingdom. While all are not entitled to the statutory exemption, it is contrary to law and fact to describe their status as "ordinary lay members." There are no laymen in Diercks' congregation of Jehovah's Witnesses, which is not an orthodox lay congregation with one minister, but is a congregation or assembly or society of missionaries, *ministers.* Diercks' 'lay' congregation was located in the missionary field that he served full time.

X.

The statement is made by the Government on page 16 of its brief that Diercks did not show a change from full-time farm work to part-time secular work. This is answered in the record, quoted on pages 5 and 6 of the petition.

XI.

The Government (top of page 17) says that Diercks was "never a leader of his congregation or substantially distinguishable from its laiety." This has heretofore been answered but it is apparent from what is said by the Government on pages 17-18 of its brief that there is a total misconception by the Government of what constitutes a regular minister.

Congress, in the report of the Senate Committee on

Armed Service, stated that the exemption was limited to the "leaders of the various religious faiths, and not for the members generally." (Senate Report No. 1268, 80th Congress, 2nd Session, page 13) It is plain from this report that Congress intended to exclude those who were not full-time ministers or not leaders of religion. Congress intended to exclude all the laymen but none of the full-time ministers.

The word "leader" used in the Senate report must be specifically qualified by the definition of "minister of religion" appearing in the act. The definition in the act specifically exempts a minister who preaches his religion *as his vocation.*

The use of the word "leader" in the Senate report appears to be irrelevant to the act. This is especially true since the report specifically adopted the definition appearing in the act. The definition is clear. It is not ambiguous. There is no indefiniteness in the terms of the act. It does not use the word "leader." Since the definition is clear and not vague, the word "leader" used in the report cannot be read into the act, unless "leader" is synonymous to the words "minister of religion." A man who pursues his ministry as his vocation may properly be said to be the "leader" in his religion. This is so regardless of the name or nature of his denomination and where or how he preaches.

The word "leader" alone used in the report of the Senate Committee on Armed Service (Senate Report No. 1268, 80th Congress, 2nd Session, page 13) may not be used to qualify or to abridge the definition appearing in the act. One reason is that the report adopted the definition used in the act. It made the term a part of the report. The other reason is very well expressed by the Supreme Court in Ex parte *Collett,* 337 U.S. 55, at page 61.

The Government cannot limit the word "minister" in the statute to a minister who preaches from the pulpit to a congregation of laymen under one roof. This is an illegal rewording of the statute. It excludes the ministers preach-

ing the doctrines of their churches as their vocation who have congregations under many roofs or no roof, the open street.

Today, as throughout history, many ministers are missionaries and evangelists. They have congregations only in the homes of the people. There they minister to the spiritual needs of their missionary flocks. There is also the street preacher. His congregation is rarely, if ever, composed of "members" of his church. It is never fixed. The definition the Government gives the Court would exclude these thousands of ministers in the United States. A reasonable reading of the act does not permit this clouding of the congressional intent. Congress certainly intended to protect the full-time minister of every religious organization. This is true even though he never preaches to a fixed congregation anywhere. It is not necessary that the listeners be members. The people hearing him may be nonmembers of his church.

This broad interpretation is proved by the protection in the act for leaders who are executives in religious organizations. Congress intended to protect administrators of every religious organization. These administrators are either ordained or regular ministers. They rarely (if ever) preach. They have no congregations. Yet they are "ministers" or "leaders" in their churches. They are administrators of their churches. This is also the case where bishops and archbishops of the Catholic Church and the Anglican Church are involved.

The practice of many churches is to have clergymen or ministers performing administrative functions. They also teach in colleges. Do these men, therefore, cease to be exempt as ministers because they are not regularly serving a congregation? In neither case would the men serving in that capacity lose the protection of the statutory exemption. In short, every church has the right to have ministers. It should be free to appoint them to whatever function they are needed in within the organization. If the regular min-

ister of one church places men in functions different from some other religion, the law is not concerned. The law will not tell the various denominations how to operate their internal affairs.

Lay brothers of the Catholic Church are not priests or "ordained" ministers. None has a congregation. None preaches from the pulpit. As a class, as regular ministers, they perform duties of a menial nature. They are not executives. They are "administrators" of the lowest type in the Catholic Church. They never conduct religious services or perform any religious rites of any kind of a sacerdotal nature in the church.

Never do the lay brothers perform any act that is a part of all religious services in any Catholic church. They are "unable to attain to the degree of learning requisite for holy orders," but are "able to contribute by their toil" and are "able to perform domestic services or to follow agricultural pursuits."—See *The Catholic Encyclopedia,* Vol. 9, p. 93.

Lay brothers are regular ministers of religion under the act.—See *State Director Advice 213-B,* as amended September 25, 1944, National Headquarters Selective Service System.

Special emphasis should be put on the term "regular minister of religion" used in the act. This shows an express intent on the part of Congress to protect all full-time ministers, regardless of whether they preach under one roof to those who are members of their church or not. The term "regular minister of religion" is a saving clause for religions. This term was included for the express purpose of protecting all ministers of religion who are not "ordained" ministers of religion.

One difference (respecting exemption of ministers was made by Congress between the 1940 Act and the 1948 Act and current Act. It was the requirement that to be exempt the minister of religion pursue his ministry as his vocation. Congress, by the use of the word "vocation," precluded

the possibility of any minister who pursued full-time secular work from being classified as a minister, when it appeared that he preached only part time. Congress intended by the use of the word "vocation" to protect only those ministers who made their ministry their main job.

The only criterion Congress imposed upon each such minister was that he pursue his ministry as his vocation. When the minister shows that preaching is his vocation, there is only one answer. He is a minister of religion exempted under the act and regulations. The exemption comes even if he has no cathedral. He should be exempt even if he is without a congregation under one roof. He is exempt when he shows that his ministry is his vocation. His vocation of the ministry makes him a "leader" in his organization. As a leading minister of his group he pursues his work as his vocation. He has been exempted by Congress.

XII.

The Government on pages 17-18 argues that the *Dickinson* case (346 U. S. 389 (1953)) is distinguished. There are many cases where the ministerial exemption for a full-time pioneer minister of Jehovah's Witnesses pursuing a substantial part-time secular job has been held to have been illegally denied. The courts have held that the performance of substantial work (less than 40 hours a week) is no basis in fact for the denial of the conscientious objector status.

Nowhere has it been made to appear that Diercks was performing 40 hours a week secular work. The truth was that Diercks devoted his afternoons and evenings to performing ministerial duties 40 to 60 hours a week. This was his performance of his regular duties as a field minister besides the 29 hours a week devoted to study and pulpit preaching. The fact that he worked in the mornings at secular work and the rest of the time during the afternoon and evening was devoted to his ministry work would refute any contention that he was performing full-time secular work.

The case of Diercks therefore falls squarely within that line of cases where pioneer ministers of Jehovah's Witnesses have been held entitled to the minister's classification notwithstanding the performance of substantial secular work.[1]

XIII.

In footnote 7 at the bottom of page 17 the Government argues that petitioner is not entitled to rely on his oral testimony given at the final hearing before he was refused the right to reopen. It has heretofore been shown that the Government is bound by this testimony. It should be remembered that Diercks was not cross-examined about this testimony. The board members were not called to contradict what he said. There is a presumption that had such board members been called they would have verified what Diercks said. The failure of the Government to call material and available witnesses cannot be overcome at this late date by suggesting for the first time in a footnote after the case gets to this Court that the evidence cannot be relied upon. Trial counsel should have brought this question up so that the truth could have been ascertained by examining and cross-examining the board members. The Court cannot indulge in the wild presumption that the testimony of Diercks was untrue or that the board members would have contradicted him.

XIV.

In footnote 7 at the bottom of page 17 the Government also suggests that the undisputed documentary evidence of

[1] *Shepherd* v. *United States*, 9th Cir., 1954, 217 F. 2d 942; *Niznik* v. *United States*, 6th Cir., 1950, 184 F. 2d 972; *United States* v. *Kose*, D. Conn., 1951, 106 F. Supp. 433; *Schuman* v. *United States*, 9th Cir., 1953, 208 F. 2d 801; *Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633; *Jewell* v. *United States*, 6th Cir., 1953, 208 F. 2d 770; *Hacker* v. *United States*, 9th Cir., 1954, 215 F. 2d 575; *Brown* v. *United States*, 9th Cir., 1954, 216 F. 2d 258; *United States* v. *Benzing*, W. D. N. Y., 1954, 117 F. Supp. 598; *United States* v. *Lowman*, W. D. N. Y., 1954, 117 F. Supp. 595; *United States* v. *Millett*, D. Mass., No. 53-263, Dec. 9, 1953; *United States* v. *Blue*, N. D. Ind., No. Cr. 1964, July 7, 1954.

Diercks appearing in his letter of December 8, 1952, be rejected on the ground that it came too late. It did not come too late. As was shown in the petition on pages 5-6 where this document is quoted, the evidence was received by the board and considered by the board after it was presented to the board in writing. The local board on January 7, 1953, one month after the document was filed, entered its final order refusing to reopen and reconsider the case. [R. 100] This action by the local board after considering the document rejects completely the suggestion of the Government that the document "came too late." In the same footnote (at the very bottom of page 17) the Government suggests that the letter of December 8 was insufficient to outweigh the hours devoted to the farm and to the insurance business. This suggestion by the Government ignores what is shown in the record, that Diercks had quit farming completely and was devoting only part time in the insurance business. The statement made by the Government is not a correct statement. From a 40-hour-a-week secular job working on the farm Diercks reduced his secular work greatly by selling insurance one third of the working day during each business day of the week and devoting two thirds of each day to the performance of his duties as a minister. This was a sufficient showing.

XV.

On page 18 the Government argues that Diercks failed to show that he was "the head of his congregation." This statement disregards completely the showing in the record that Diercks was the assistant head of the congregation of Jehovah's Witnesses and that he had several offices as leader and assistant presiding minister in the congregation. The Government also argues that there was no showing that a congregation of 36 to 40 persons required a second minister. There was a showing by reason of his appointment. In any event this is an ecclesiastical determination that cannot be challenged in the absence of a showing of

fraud. The Government has not suggested that fraud exists in the appointment of Diercks as assistant presiding minister.—*Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, 116; *Watson* v. *Jones,* 13 Wall. (80 U. S.) 679; *United States* v. *Ballard,* 322 U. S. 78, 86-87; *Gonzalez* v. *Archbishop,* 280 U. S. 1, 16-17.

If the position of the Government (that a congregation of 40 persons is not entitled to more than one minister) is correct, then many churches in this country will have their assistant presiding ministers unfrocked. Also, in many churches in England and in the Scandinavian countries of Europe, the number of persons who attend regularly does not exceed 30 to 40 persons on Sundays. Yet these churches have several assistant presiding ministers presiding over the congregations. The suggestion made by the Government, that there cannot be an assistant presiding minister in a congregation of 40 of Jehovah's Witnesses, ignores the fact that the organization has found it necessary to have such assistant presiding ministers and also that Jehovah's Witnesses preach in the missionary field. The work of the assistant presiding minister does not stop at congregational duties performed inside the church house. He, like the senior presiding minister, supervises the missionary work of Jehovah's Witnesses carried on in the missionary field. And this work, illegally characterized as "lay activity" by the Government is ministerial and is preaching within the meaning of the statute, regardless of the exempt status of the persons acting under the supervision of the presiding minister or his assistant, the petitioner in this case.

XVI.

The argument of the Government that the preaching activity of a pioneer full-time minister of Jehovah's Witnesses, such as petitioner, is merely "common lay work" (page 18, Government's brief) defies the statute. It is an effort on the part of the Government to set itself up as a hierarchy to decide what is orthodox in preaching, contrary

to the holding of this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109 (1943): "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion." It also flies in the teeth of the holdings by this Court in *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 116; *Watson* v. *Jones*, 13 Wall. (80 U. S.) 679; *United States* v. *Ballard*, 322 U. S. 78, 86-87; *Dickinson* v. *United States*, 346 U. S. 389, 395 (1953).

Congress did not prescribe any definite sort of preaching before a preacher could claim exemption under the act. Congress merely said in Section 16(g)(50 U. S. C. App. § 466(g)) the minister would have "to preach and teach the doctrines of such church, sect or organization and to administer the rites and ceremonies thereof in public worship." Congress did not say 'according to some other church,' as the Government would like to impose against Jehovah's Witnesses. Congress said "according to such church," and this would of necessity include the church of Jehovah's Witnesses, and not according to the idea of the Government as to what is and is not proper preaching.

The position that the Government takes in this matter has been rejected by the court below in the case of *United States* v. *Ransom*, 7th Cir., 1955, 223 F. 2d 15. The Government did not apply for a writ of certiorari. It is suggested that the Government ought to be bound by the decision in that case, which holds that the full-time pioneer ministers of Jehovah's Witnesses are entitled to the exemption, the same as the orthodox clergy.

XVII.

The Government would like to have this Court reject the record in this case, which establishes that there was a state-wide discrimination against Jehovah's Witnesses. Such suggestion is made on pages 19-20 of the Government's brief. It is said that the sworn testimony of petitioner was

"his own recollection of purported oral statements." This same characterization could be made against the sworn testimony of any witness in any case. If the Government is to be allowed to cast aside undisputed evidence established by sworn testimony that is not cross-examined and is not contradicted by witnesses that it could call, the board members themselves, then there is an end to relying on records in any case. The law does not permit the Government to censor the testimony of witnesses and argue that it be discarded, especially on appeal. The Government did not challenge or contradict this testimony in the district court. No effort was made to challenge it in the court of appeals. In both the district court and in the court of appeals this testimony was treated as though it were true. The Government chose to demur to the evidence. Since the Government has taken the position of demurring to the evidence in the district court and in the court of appeals it is entirely too late for the Government to attempt to contradict it here for the first time. The board members were available to the prosecutor in the district court. The clerk of the board was called to give testimony. [R. 13, 14] The Government made no effort to put this clerk back on the witness stand and contradict anything that Diercks testified to. The case was closed without recalling her. The Government rested and closed its case without calling the board members. The Government was thoroughly satisfied with the testimony and was bound by it.

It is highly improper at this late date to suggest to this Court that this sworn, uncontradicted evidence, which is presumed to be true because of the failure of the Government to call its witnesses to contradict it, should be rejected and disregarded. The testimony of the petitioner was quoted at length on pages 5-6 of the petition and it need not be repeated here. It appears also in the record. [R. 95-96] The Court is referred to it and also to the record, which shows that the Government rested its case without challenging this testimony. This belated turnabout by the Govern-

ment ought not to be accepted by this Court. The Government should be held to the same position that it took in the district court and in the court of appeals, that what Diercks testified to was fact. The case was decided on this basis in the two courts below. There is no reason why now a different approach should be chosen in order to avoid the issue reached and decided in the two courts below.

CONCLUSION

WHEREFORE, for the reasons appearing in the petition, as well as for those stated above, the petition for writ of certiorari should be granted and the questions limited to those that are stated on pages 2 and 3 of the petition and not broadened to include question 1 on page 2 of the brief for the Government.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

September, 1955.